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No. 101

IN THE

Supreme Court of the United States

No. OCTOBER TERM, 1932

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, Deceased,

Petitioners

vs.

Louise Chase, By Jesse Blythe, Prochein Ami and Louise Chase in Her Own Right,

Respondents

BRIEF FOR RESPONDENT-APPELLEE

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Summary Statement of Matter Involved 1

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1932. No.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED,
Petitioners

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE IN HER OWN RIGHT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Louise Chase, the plaintiff below, in answer to the petition of the executors of the Estate of Frank G. Ormsby, deceased, respectfully shows to this Honorable Court:

1. SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was brought to recover damage for the personal injury received by the respondent in the City of New York in 1925, when a passenger in an elevator which fell from the fifth floor to the basement in a building owned by Frank G. Ormsby.

The allegation was that the owner of the building was grossly negligent. By reason of the character of the injury and the fact that the plaintiff was in a hospital for almost two years, no suit was brought for damages until April, 1927. In the meantime Ormsby died. Ormsby was domiciled in the City of Easton, Pennsylvania, and his executors were appointed by the Orphans' Court of Northampton County, Pennsylvania. The action being transitory in character could be brought either in New York or Pennsylvania and under the statutory law of Pennsylvania an action for damages for personal injury can be maintained against the estate of the tortfeasor.

An affidavit of Defense was filed by the Executors of Ormsby which was an affidavit upon the merits of the case. This affidavit was filed on May 2nd, 1927, and the case was placed on the trial list October 23rd, 1928, and was on two subsequent lists. The Affidavit of Defense also raised the question of the law as to the right to maintain the action because under the law of New York the action did not survive. Counsel for Plaintiff and Defendant filed a stipulation at the suggestion of the Judge of the lower Court in order that this preliminary question might be disposed of. The District Court held that the question could not be properly decided under that stipulation and directed that the case be placed on the trial list. When the case was called for trial

plaintiff was required to make an offer of proof. The offer was objected to and the objection sustained and the Court entered a compulsory non-suit which it refused to take off. Plaintiff took the position that the filing of an Affidavit of Defense on the merits without having filed a Statutory Demurrer was a waiver of any such question by the Defendant. The Court did not discuss this proposition but rested its decision entirely upon the view that under the law of New York no right of action exists.

The Circuit Court of Appeals reversed the Trial Judge on this point but did not discuss the question of the waiver.

II. REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE ALLOWED

1. The decision of the Circuit Court of Appeals was that the right of respondent to recover damages in this action is governed by the laws of the forum and not the lex loci delicti. The Circuit Court of Appeals reversed the judgment and granted a venire facias de novo. This was an interlocutory decree and the question sought to be raised by a writ of certiorari can more properly be raised after the trial of the case on its merits.

2. The filing of the Affidavit of Defense on the

merits while it included a paragraph raising the question of the legal right to maintain the action was under all the authorities a waiver of any open question and for this reason the Writ of Certiorari should not be allowed.

Wherefore, the respondent respectfully prays that the Court refuse to grant a Writ of Certiorari.

LAURAN CHASE,
Respondent.

By FOX AND FOX,
Attorneys for the Respondent

BRIEF IN SUPPORT OF THE ANSWER OF THE RESPONDENT

1. Opinion of the United States Circuit Court of Appeals for the Third Circuit printed in the record shows that the Court directed a new trial. This was such an interlocutory decree as required that the case be tried on the merits and the question of the jurisdiction of the Court can be properly determined after the trial on the merits.

2. The Respondent further avers that there can be no such question raised because the Defendant has waived the right to assert a lack of jurisdiction.

ARGUMENT

A. Did the defendant waive all objections to jurisdiction?

B. Is the decision of the Circuit Court of Appeals that the lex loci delicti does not govern in conflict with the decisions of this Court?

POINT A

The suit was brought in March of 1927. On April 27th, the Defendant appeared and on the 9th of

May, 1927, filed an Affidavit of Defense to the merits. By the law of Pennsylvania Practice Act of 1915 which provides that the Defendant may raise any question of law without answering the averments of fact in the Statement of Claim and this may be disposed of by the Court on preliminary motion. By the Act of 1925 of Pennsylvania, P. L. 23, it is further provided that wherever in any proceeding at law or in equity the question of jurisdiction over the defendant or of the cause of action for which suit is brought is raised in the Court of first instance, it shall be preliminarily determined by the Court. And further provides for appeal and contains this provision: "A failure to appeal within the time specified will be deemed a waiver of all objections to jurisdiction over the defendant personally."

Therefore, if the Defendant had raised the question as required by the Act of 1915, the matter should have been disposed of preliminarily and the failure to do so must be regarded as a waiver of all objections.

Independent of this statutory provision the decision of the Supreme Court of Pennsylvania in the case of *Daley vs. Iselin*, 212 Pa. 279, the Court said:

> "The defendant could have prevented any pleading on the merits subsequent to his dilatory plea until that had been disposed of, if he had so desired. On the other hand, he could

unquestionably waive his right to insist on his plea and submit himself to the jurisdiction of the Court. This may be done as effectively by his acts as by his positive agreement, and we think that the defendant's conduct clearly establishes that he did so in this case. On October 1, 1901, the time the plaintiffs made their motion to strike the dilatory plea from the record, the plea of non assumpsit had been entered and had remained on the record for more than two years with the knowledge of defendant's counsel acquired from the trial lists. This motion should have been allowed had it been made at the time the cause was called for trial on its merits in September, 1900, when the defendant's counsel suggested that the plea in abatement should first be disposed of."

This case was followed by the following cases all of which sustain the position here taken:

Feather vs. Hustead, 265 Pa. 357;
Fennel vs. Guffey, 155 Pa. 38;
Larkin vs. Scranton, 162 Pa. 289;
Boyle vs. Breakwater Co., 239 Pa. 577;
Steel vs. Levy, 282 Pa. 338;
Specktor vs. Hanover Insurance Co., 295 Pa. 390.

In *Connaway vs. McLeod Bank,* 178 U. S. 421, the Court said:

"As to the suggestions that the suit was brought in the wrong district that objection,

if it could be raised by the company at all, came after the defendant had pleaded in bar and too late. Citing Texas & Pacific Ry. vs. Saunders, 151 U. S. 105; St. Louis & San Francisco Ry. vs. McBride, 141 U. S. 127; Texas & Pacific Ry. vs. Cox, 145 U. S. 593."

POINT B

DID THE DEATH OF THE DEFENDANT ABATE THE RIGHT OF ACTION IN PENNSYLVANIA?

The learned Judge of the District Court in his opinion says "this cause must look for its ruling to the misty subject of the Conflict of Laws."

There are a large number of cases in both the United States Courts and the State Courts relating to the question of the survivability of a pending action. In the present case at the time of the death of Ormsby no action was pending. By reason of the serious injury to the Plaintiff she was unable to give any attention or thought to the action. If Ormsby was negligent, (which must be conceded for the purpose of this argument), the falling of the elevator and the consequent injury to the plaintiff gave rise to a cause of action.

"A cause of action has been defined in general terms to be a legal right invaded without

justification or sufficient excuse. Upon such invasion a cause of action arises which entitles the party injured to some relief by the application of such remedy as the law may afford . . . Causes of action are sometime confounded with remedies, but the cause of action and the remedy sought, are entirely different matters." (1 R. C. L. p. 314).

Therefore, on the day of the accident a cause of action was created for the plaintiff against the defendant and vested in her a property right which could not be taken away except by the intervention of a statute of limitations. The remedy, as was said above, is separate and distinct from the cause of action. In this case the remedy was either a suit in the State of New York, where the injury occurred, or a suit in the State of Pennsylvania where Ormsby lived and the bulk of his property existed, and the right to bring this transitory action in either state continued to exist for the statutory period. (7 R. C. L. Page 1058). The plaintiff could, therefore, have begun her suit in Pennsylvania immediately after the accident. The death of Ormsby, nine months later did not change the vested property right of the plaintiff in the cause of action, nor did it change the principle of law that the assertion of her right by an action was transitory, not local and could be maintained in another state.

When, therefore, the plaintiff, after the death of Ormsby brought her suit in the United States Court

for the Eastern District of Pennsylvania, her rights are to be determined by the law of Pennsylvania which expressly provides that in case of death of the wrongdoer the personal representatives of the wrongdoer may be made parties defendant in such an action.

Section 955 of the Revised Statutes of United States does provide for the case of the death of a wrongdoer with an action pending, but is silent upon that question where the suit is not actually pending at the death. (See Title 28, U. S. Code Annotated, Sec. 778).

> "Whether a cause of action survives by law is not a question of procedure, but of right; and is determinable when the action is one arising at common law, not by the law of the state where the injuries were inflicted, but by the law of the state where the action is brought."
>
> *Martin vs. Wabash R. R. Co.*, 142 Fed. Rpt. 650.

The Federal Courts have in a number of cases recognized the fact that the survivability of a cause of action or a right of action is dependent upon the law of the forum or the law of the state wherein the action is brought. In 1 Ruling Case Law, page 27, Sec. 20, the principle is thus stated:

> "The survivability of a cause of action is a property right. Federal Courts, therefore, are governed by local state laws as to what causes

> of action survive and this is because State Legislatures have absolute dominion over the property or estate of dead men and over their affairs in their relation to the living. In determining what causes of action survive at common law, Federal Courts are governed by the law of the state where the action is brought."

In the case of *Tenn. Coal Co. vs. George*, 233 U. S. 354 suit was brought by servant against the master for injuries occasioned by defective machinery. The Act of Alabama provided that all actions must be brought in the Court of competent jurisdiction within the State of Alabama and not elsewhere. Suit was brought in Atlanta, Ga. A plea in abatement was filed setting up this provision of the Act of Alabama. The Court said:

> "Whether the statute be treated as prohibiting certain defenses as removing common law restrictions or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action. The right and the remedy are not so inseparably united as to make the right depend upon its being enforced in a particular tribunal. The cause of action is transitory and like any other transitory action to be enforced in any Court of competent jurisdiction within the State of Alabama."

See also the case of *Atchison T. & S. F. R. R. vs. Sowers*, 213 U. S. 55, in which the Court there an-

nounced the general rule that a transitory cause of action can be maintained in another state, even though the statute creating the cause of action provides that the action must be brought in local domestic Courts.

In *Schreiber ex. Sharpless*, 110 U. S. 76, the court held that the survivability of right of action is not a matter of procedure as in the remedy of a suit pending at the time of death.

In *Warren ex. Furstenheim*, 35 Fed. Reporter 691, it is said:

> "The right to revive an action in a Federal Court is made by the United States Statute to depend upon the survivability of the cause of action and the question whether a common law cause of action survives will be determined by the Federal Court in accordance with the law of the state where the action is brought, although the cause arose in another state."

We, therefore, believe it is a sound legal position to say that independent of the question of waiver as Ormsby was domiciled in Pennsylvania, and died in Pennsylvania, and his estate is administered in Pennsylvania the right of action which Miss Chase had and which was transitory is to be determined by the law of Pennsylvania and not by the law of New York.

In the case of *Martin v. Wabash*, 142 Fed. Rep. 650, the Court said:

"Whether a cause of action survived by law is not a question of procedure but of right and is determinable when the action is one arising at common law not by the law of the state where it arose but by the law of the state where the action is brought."

In the case of *Whitten v. Bennett*, 77 Fed. Rep. 272, the Court said:

"The survival of a cause of action for false imprisonment depends upon the law of the jurisdiction in which the tortfeasor is domiciled and not upon the law of the jurisdiction in which the wrong was committed."

In the case of *B. & O. v. Joy*, 173 U. S. 226, the Court said:

"Whether a pending action may be revived in a Federal Court upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced and in the present case is not affected in any degree by the fact that the deceased received his injuries in Indiana. The precise question in this case was 'does an action pending in the Circuit Court of the U. S. sitting in Ohio brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana finally abate upon the death of the plaintiff in view of the fact that

had no suit been brought at all the cause of action would have abated, both in Indiana and Ohio, and that even if suit had been brought in Indiana the action would have abated in that state.' The Court answered, 'No.'"

The cases cited can be readily distinguished from the present case because the law of Pennsylvania under the Act of March 30th, 1921, Pamphlet Laws 235, gave to Miss Chase the right to make Ormsby's administrator a party defendant. That Act provides as follows:

> "March 30th, 1921, P. L. 255, Sec. 35 (b): Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived."

We cite this statute, therefore, to show that notwithstanding any provision of the law of New York the law of Pennsylvania permits the bringing of this action as Ormsby was domiciled in Pennsylvania.

In *Martin v. B. & O.*, 151 U. S. 673, the Court held:

> "That whether the administrator has a right of action depends upon the law of West Virginia where the action was brought and the administrator appointed."

In *Dimmick vs. Railway Co.*, 103 U. S. 2, the Court held:

> "Wherever by either the common law or the statute a law of a state, a right of action has become fixed and a legal liability incurred that liability may be enforced and the right of action pursued in any Court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The action in the present case is in the nature of trespass to the person always held to be transitory and the venue immaterial."

In Pollock, *Torts 11th Edition*, page 61, in discussing the rule that the right of action does not survive the death rights says that the rule is a barbarous one and proceeds:

> "Then as to the right; it is supposed that personal injuries cause no damage to a person's estate, and therefore, after his death the wrongdoer has nothing to account for. But this is ofttimes not so in fact and in any case why should the law contrary to its own principles and maxims in other departments presume it

in favor of the wrongdoer so to be."

If Ormsby as the owner of a large apartment building in New York was guilty of gross negligence in maintaining his elevator and he dies leaving an estate which includes among its assets this very apartment building, should not his estate respond in damages to the party injured by his negligence?

We, therefore, submit that a Writ of Certiorari should not be granted.

FOX AND FOX,
Attorneys for the Respondent.